In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 315

UNITED STATES OF AMERICA EX REL.
DALE H. SNYDER, PETITIONER

v.

H. TURLEY, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was arrested in the Eastern District of Pennsylvania on June 7, 1966, pursuant a warrant issued on a complaint charging him with bank robbery, in violation of 18 U.S.C. 2113. At a preliminary hearing on the same day before a United States Commissioner, an F.B.I. agent testified that he had been told by a teller of the robbed bank that she thought she recognized petitioner as the robber. The

agent also testified that, when petitioner was arrested (some seven months after the robbery), he had in his possession several five dollar bills which were part of the stolen money, and that petitioner's wife had deposited some of the stolen bills in her bank account a few days previously (Tr. 26-28).[1] The Commissioner directed that the identifying witness be produced at a hearing which he scheduled for 2:30 p.m. on June 14. Bail was set at $25,000, but petitioner did not post bond and was confined at the federal detention center in Philadelphia. Shortly before the continued preliminary hearing began, a grand jury indictment was returned against petitioner charging him with the bank robbery. When the Commissioner was informed of this circumstance, he immediately terminated the preliminary hearing, concluding that it no longer should be held.

On the following day, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, alleging that he was being illegally confined because of his failure to be accorded a preliminary hearing. The district judge issued a show cause order and fixed bail at $25,000. The next day (June 16) petitioner posted the required bond and was released. Thereafter a hearing on the habeas corpus application was held. The government interpreted the judge's bail order as applying to the entire period pending trial and argued that the case was moot since petitioner, even if found

[1] "Tr." refers to the transcript of proceedings at the hearing on petitioner's habeas corpus application.

entitled to the relief he requested, would remain subject to the bond until trial, pursuant to the authority of the indictment. The judge, however, stated that by his order he had meant to fix bail only pending the hearing on the petition, with the proviso that "if for any reason the petition is dismissed [he] would set bail at $25,000 on the indictment" (Tr. 7, 11). The hearing then proceeded on the merits. Subsequently, the district court held that the intervening indictment had superseded the Commissioner's warrant and had eliminated the need for a preliminary hearing (Pet. App. 2-6), and accordingly denied the habeas corpus petition (Pet. App. 1).

Petitioner appealed this denial to the Third Circuit. In oral argument the government renewed its contention that the case was moot, pointing out that under the terms of the district judge's bail order, as clarified by him at the hearing, petitioner, following the dismissal of his petition, was automatically free on bond under "the indictment." The government also filed a written motion to dismiss, urging (in addition to the fact that petitioner was out on bail) that the case was moot because the intervening indictment had "determined the issue of probable cause leaving nothing for a United States Commissioner to decide." The court of appeals, by order, dismissed the appeal as moot (Pet. App. 7).

1. It is apparent that some confusion has existed in this case because of petitioner's failure to utilize his proper remedy—mandamus. Mandamus, rather than habeas corpus, is the clearly applicable form of relief since petitioner's contention—that he was unlawfully

denied a preliminary hearing—would not, even if vindicated, entitle him to be released free of his bond, but would merely entitle him to the hearing he demands. See *Blue* v. *United States*, 342 F. 2d 894 (C.A.D.C.), certiorari denied, 380 U.S. 944; *Ross* v. *Sirica*, No. 20,535 (C.A.D.C., January 23, 1967). Whatever may have been the intention of the district judge when he originally fixed the bond, it is clear that, at the time the case reached the court of appeals, petitioner was out on bail pursuant to the indictment. He would remain out on bond under the indictment even if he showed that his original detention under the authority of the Commissioner's warrant was unlawful. Hence this case does not at all present the issue which petitioner argues (Pet. 8-11), *i.e.*, whether the restraint of bail is sufficient custody to support a habeas corpus proceeding under the reasoning of *Jones* v. *Cunningham*, 371 U.S. 236. The significant fact is that the relief petitioner seeks would in *no* way affect whatever custody he could be said to be subjected to. No contention is possible (nor does petitioner argue) that the indictment would be invalid because of petitioner's failure to receive a preliminary hearing. A grand jury need not await the outcome of a preliminary hearing before returning an indictment, nor would it be bound by a commissioner's adverse decision on the issue of probable cause. Treated strictly as a habeas corpus proceeding, therefore, the court of appeals properly dismissed the cause as moot.

2. It is somewhat unclear, however, that the court of appeals dismissed the case as moot on these narrow

grounds. It may well be that the court merely adopted that term, which the government had employed in its motion, to refer to the concept that the intervening indictment had "determined the issue of probable cause leaving nothing for a United States Commissioner to decide." [2] Such a ruling on the merits of the controversy would be justified under settled law.

The basic purpose of a preliminary hearing is to determine whether there is probable cause to believe that a person arrested committed the charged offense (see F.R.Crim.P., Rule 5(c)). The return of an indictment decides that issue and thus renders the holding of the hearing unnecessary. The federal courts of appeals which have considered this question, with the possible exception of the District of Columbia court, have unanimously so held. *E.g.*, *United States* v. *Motte*, 251 F. Supp. 601 (S.D.N.Y.), mandamus denied, No. 30,317, June 6, 1966 (C.A. 2), certiorari denied *sub nom. Motte* v. *Ryan*, 384 U.S. 975; *United States* v. *Heap*, 345 F. 2d 170 (C.A. 2); *Vincent* v. *United States*, 337 F. 2d 891, 896 (C.A. 8), certiorari denied, 380 U.S. 988; *Byrnes* v. *United States*, 327 F. 2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970; *United States* v. *Salliey*, 360 F. 2d 699 (C.A. 4); *United States* v. *Chase*, 372 F. 2d 453, 467 (C.A. 4). This Court recently intimated its agreement with

---

[2] If the proceeding, although delineated as habeas corpus, were viewed, because of the nature of the relief sought, as an application for mandamus to compel the holding of a preliminary hearing, then the cause would not be technically moot since it would be possible to order the relief demanded.

that position in *Jaben* v. *United States*, 381 U.S. 214, 220.

Petitioner relies on two cases from the District of Columbia holding that an intervening indictment does not destroy an arrested defendant's right to a preliminary hearing for the reason that a preliminary hearing has a coordinate purpose (in addition to determining probable cause), not fulfilled by the return of an indictment, of providing a discovery mechanism whereby a defendant may learn part of the evidence against him. *Blue* v. *United States*, *supra*; *Ross* v. *Sirica*, *supra*. However, the state of the law in the District of Columbia on this issue is far from clear. In *Crump* v. *Anderson*, 352 F. 2d 649 (C.A.D.C.), decided after *Blue* but before *Ross*, a different panel reached a result opposite from that in *Blue* and *Ross*. In the *Ross* case, the government petitioned for a rehearing *en banc* which was denied *per curiam* (by a 5-4 vote). Most of the judges filed concurring or dissenting statements indicating their views. These statements showed that only the panel which decided *Ross* (which included Judge Fahy, since retired) adhered to the rationale that a preliminary hearing has a "discovery" function. Two judges concurred on the theory that requiring a preliminary hearing after an intervening indictment could sometimes be used as a "sanction" against the government, and the four dissenting judges would have followed the law of other circuits holding a preliminary hearing unnecessary once an indictment has been returned determining probable cause.

In any event, those decisions fall within the special province of the District of Columbia Court of Appeals to fashion rules for its circuit, and thus do not present a conflict requiring resolution by this Court.[3] Whatever justification there may be for using a preliminary hearing as a discovery device in connection with the type of local crimes falling within the jurisdiction of the District of Columbia, there is no reason to extend that concept to other federal jurisdictions. The preliminary hearing generally comes at too early a stage in the proceeding prior to trial to be effective as a discovery device. Moreover, the number and kind of witnesses which the government will call at the hearing depends primarily upon the discretion of the commissioner, rendering the hearing generally unsuitable for discovery purposes.[4] Thus discovery, while an occasional by-product of a preliminary hearing, is not a purpose thereof and does not furnish grounds entitling a defendant to demand such a hearing, on the chance that he may benefit therefrom, once an indictment has been returned. The amended Federal Rules of Criminal Procedure, now in effect, have made ample provision for discovery before trial. There is no reason why the preliminary hearing, which serves an entirely different function, should be used for

---

[3] This point was specifically mentioned by the district judge in distinguishing and refusing to follow these C.A.D.C. cases (see Pet. App. 5-6).

[4] In this regard, see the findings of the Senate Subcommittee on Improvements in Judicial Machinery, at 113 Cong. Rec. S 1885 (daily ed., February 9, 1967).

such purpose. Prompt bringing of charges by indictment ought to be encouraged, not challenged or discouraged.[5] No further review, or exercise of this Court's supervisory powers, is here warranted.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

JULY 1967.

---

[5] For this reason the prosecutor's decision to proceed by way of indictment following the initial hearing before the Commissioner was not improper, as petitioner implies (Pet. 5-6).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 270965 71